BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUSTIN CALVERT	)	
Claimant	)	
	)	
VS.	)	
	)	
IMAGE QUEST, INC.	)	
Respondent	)	Docket No. 1,031,106
	)	
AND	)	
	)	
STANDARD FIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the November 8, 2006 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The claimant alleged injury to his right knee when he heard it pop as he was kneeling down at work. Respondent denied claimant was injured at work and argues that claimant did not describe a work-related injury to medical providers and the claimant told his supervisor that his injury was not work-related. Consequently, respondent further argues claimant has failed to meet his burden of proof that he suffered a work-related accident.

The Administrative Law Judge (ALJ) determined the claimant's accidental injury arose out of and in the course of employment and therefore ordered respondent to pay temporary total disability compensation and medical benefits.

The respondent requests review of whether the claimant's injury arose out of and in the course of employment with the respondent.

Claimant requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Justin Calvert was employed as a service technician for the respondent. His job duties included repairing and servicing copiers and fax machines. On September 12, 2006, the claimant was kneeling down to look inside a copier when he heard his right knee pop. The claimant continued to work. He testified:

> Q. Did you later develop some problems in that knee?
>
> A. The next morning when I woke up, it was swollen and I couldn't bend it or straighten it.
>
> Q. You have another job, is that correct?
>
> A. That is correct.
>
> Q. Where else is it that you work?
>
> A. Fed Ex.
>
> Q. This would have been the morning of September 13th?
>
> A. That is correct.
>
> Q. You were already having problems before you went into work at Fed Ex, is that correct?
>
> A. That is correct.[1]

The claimant completed his 3:30 to 7:30 a.m. shift at Fed Ex, where he loads trucks with boxes, and even though his knee was getting worse he then reported to work for respondent at 8 a.m. He only worked a couple of hours because he was not able to kneel down to work inside the copiers. Claimant testified he called his service manager, Kevin Renfro, about his knee popping at work the previous day and was told to seek medical treatment. Claimant went to his own physician, Dr. Brian Johnson. The doctor prescribed some anti-inflammatory medication.

When claimant sought medical treatment with Dr. Johnson on September 13, 2006, he provided the doctor with a history of three prior surgeries on his right knee and that his right knee had been bothering him the last week. The history further indicated that a couple of days ago as claimant got up from a kneeling position he heard a pop in his knee and then developed swelling and stiffness in his knee.

On September 14, 2006, Mr. Renfro e-mailed respondent's chief operating officer, Jack Boucher, and told him that claimant would not be at work as he had injured his knee.

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[1] P.H. Trans. at 8-9.

The message detailed that claimant had told Mr. Renfro on September 13, 2006, that he had injured his knee the previous evening. The e-mail concluded with the statement that the injury was not work-related.

The following Monday, September 18, 2006, claimant went back to work on crutches but was told by respondent's owner and Mr. Boucher that there was no work available for him while he was on crutches. They also suggested claimant obtain a second medical opinion as his knee condition had not improved. Claimant testified that he told them the injury was work-related although how the injury occurred was not discussed.

Mr. Boucher denied that claimant told him his knee injury occurred at work. Mr. Boucher testified that he had received Mr. Renfro's e-mail which indicated claimant's knee injury was not work-related. He further testified that at the Monday meeting the discussion initially was directed at whether there was an accommodated job claimant could perform while on crutches. Mr. Boucher testified claimant told him that he did not know how he had hurt his knee. Finally, Mr. Boucher agreed that while he did not direct claimant to a specific physician, he did encourage claimant to see another doctor and not wait for his next scheduled appointment.

When claimant sought treatment with Dr. Bruner on September 19, 2006, he filled out a patient information sheet which noted his symptoms first appeared on September 1, 2006. The claimant checked a box on the form that the condition was job related but also wrote "maybe job related." In response to a question on the form as to where and how he was injured, the claimant wrote "Don't know - no known specific injury."

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3]

Respondent argues claimant is not credible. Initially, respondent notes and claimant admitted that he had been counseled about falsifying records regarding how long he spent working for various customers. Respondent next notes that Dr. Johnson's September 13, 2006 office note indicated the accident occurred two days before the visit whereas claimant alleged the accident occurred the day before the office visit. Respondent further notes the form claimant filled out for Dr. Bruner indicated a date of accident of September 1, 2006. Finally, respondent's supervisor and chief operating officer both indicated claimant did not tell them his knee injury was work-related. Respondent concludes the cumulative effect

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[2] K.S.A. 44-501(a).

[3] K.S.A. 2005 Supp. 44-508(g).

of the inconsistencies warrant a finding claimant has failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment.

Conversely, claimant notes that his testimony was taken before Dr. Johnson's medical records were obtained and the history of injury is the same. And although the form filled out for Dr. Bruner did indicate that there was no specific injury, it nonetheless was checked as job related. Finally, claimant argues he did tell his supervisor his injury was work-related and he further told respondent's owner and Mr. Boucher.

Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In granting claimant's request for medical treatment and temporary total disability benefits, the ALJ believed claimant's testimony over the respondent's representative. Some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

It should be noted that claimant's supervisor did not testify and explain how he arrived at the conclusion contained in his e-mail that claimant's knee injury was not work-related. Nor did respondent's owner testify regarding the Monday, September 18, 2006 meeting with claimant. Thus, claimant's testimony that he told those two individuals that his knee injury was work-related was contradicted by the e-mail and Mr. Boucher's testimony. Moreover, claimant testified that his injury occurred while kneeling when he heard a pop in his knee. That description of how the injury occurred was provided to Dr. Johnson at claimant's first office visit. This Board member concludes claimant has met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment and affirms the ALJ's Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated November 8, 2006, is affirmed.

IT IS SO ORDERED.

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[4] K.S.A. 44-534a.

[5] K.S.A. 2005 Supp. 44-555c(k).

Dated this _____ day of January 2007.

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
William L. Townsley, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge